United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1234

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1234

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P/S

UNITED STATES OF AMERICA,

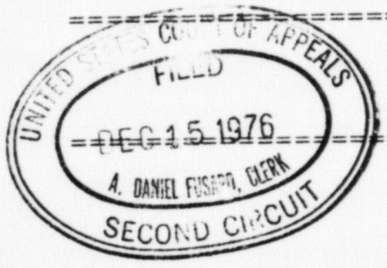
Plaintiff-Appellee,

v.

FRANCOIS ROSSI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York



PETITION FOR REHEARING

ALBERT J. KRIEGER
745 Fifth Avenue
New York, New York 10022

JOSEPH BEELER
2000 South Dixie Highway
Coconut Grove
Miami, Florida 33133

Attorneys for
Defendant-Appellant

Of Counsel:
DONNA R. BLAUSTEIN
1753 Alton Road
Miami Beach, Florida 33139

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PETITION FOR REHEARING

Defendant-appellant, FRANCOIS ROSSI, by his attorneys, respectfully petitions this Court pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure for entry of an order granting a rehearing in the above case.

In support of his motion defendant-appellant states as follows:

1. On November 11, 1976, the panel, in a per curiam opinion, affirmed his conviction for conspiring to traffic in narcotics between January 1965 and February 1973 although he had only been extradited and delivered to the United States for a similar offense alleged to have occurred between January 1969 and September 1972. (A copy of the opinion is appended hereto for the convenience of the Court).

2. On December 6, 1976, the Court extended the time within which to petition for rehearing until December 15, 1976.

3. Rehearing should be granted for the following reasons:

a) The Second Circuit Court of Appeals has now reduced the extradition "principle of specialty" to this: the defendant may be extradited to one District and reindicted and tried in any other District, United States v. Paroutian, 299 F.2d 486, 490-91 (2d Cir. 1962); Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir.), cert. denied, 409 U.S. 1059 (1972), counts may be added after the extradition, United States v. Paroutian, supra, the defendant may be tried for a similar offense occurring subsequent to the one for which he has been extradited, Fiocconi v. Attorney General of the United States, supra, and, now, the defendant may be tried

for a similar offense commencing years earlier than the one for which he has been indicted. We doubt that the Court of Appeals is horrified with this result. But we do respectfully suggest that the Court has departed from the strict policies laid down by the Supreme Court and has basically dealt with such Supreme Court cases as United States v. Rauscher, 119 U.S. 407 (1886) and Johnson v. Browne, 205 U.S. 309 (1907) as if they were no longer good law. The construction of law approved by the Supreme Court was stated this way in Johnson v. Browne, supra, at 321:

> It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense.

If the Court of Appeals disagrees, it should state its disagreement. Otherwise, defendants conviction "for another and different offense"--albeit a narcotics offense--should be reversed. Under Rauscher and Browne, United States Courts should not surmise that another sovereignty has no regard for such technicalities as the distinction between different crimes--whether of different or identical nature.

b) The Court's opinion in this case concluded "Appellant's other assertions of error merit no discussion". Respectfully, we suggest that this statement is another reflection of the Second Circuit's particular laxness in admitting evidence of other crimes, wrongs or acts. See Brief for Appellant at 12 - 16. The inclusionary rule prevailing in the Second Circuit has been superceded by the more stringent exclusionary rule of the Federal Evidence Code. Rule 404(b), Rules of Evidence for United States Courts and Magistrates. The panel's decision approving the admission of cash seized from an apartment and false travel documents seized from the defendant after the conspiracy had terminated violates that rule and conflicts with the law of other Circuits. E.g., United States v. Clemons, 503 F2d 486, 488-91 (8th Cir. 1974); United States v. San Martin, 505 F.2d 918 (5th Cir. 1974). The petition for rehearing should be granted so that the "other crimes" law of the Second Circuit can be brought into conformity with the Federal Evidence Code.

Respectfully submitted,

ALBERT J. KRIEGER
745 Fifth Avenue
New York, New York 10022

JOSEPH BEELER
2000 South Dixie Highway
Coconut Grove
Miami, Florida 33133

Attorneys for
Defendant-Appellant

Of Counsel:

DONNA R. BLAUSTEIN
1753 Alton Road
Miami Beach, Florida 33139

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 285—September Term, 1976.

(Argued September 30, 1976 Decided November 11, 1976.)

Docket No. 76-1234

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCOIS ROSSI,

Defendant-Appellant.

Before:

FEINBERG, GURFEIN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment convicting appellant of conspiracy to traffic in heroin in violation of former § 174 of 21 U.S.C. after a jury trial in the United States District Court for the Eastern District of New York before Chief Judge Jacob Mishler.

Affirmed.

JOSEPH BEELER, New York, N.Y. (Albert J. Krieger, New York, N.Y.; Donna R. Blaustein, Miami Beach, Florida, of Counsel), *for Defendant-Appellant.*

PETER R. SCHLAM, Assistant U.S. Attorney (David G. Trager, U.S. Attorney for the Eastern District of New York, of Counsel), *for Appellee.*

PER CURIAM:

On October 16, 1972, appellant was charged in indictment 72-CR-1162 issued in the United States District Court for the Eastern District of New York with conspiring to traffic in narcotics between January 1969 and September 1972. On February 13, 1973, the United States requested Spanish authorities to provisionally arrest appellant pending a formal request for his extradition. On February 15, 1973, a second indictment 73-CR-164, was issued in the Eastern District charging appellant with conspiring to traffic in narcotics between 1965 and the date of the indictment. The government then requested appellant's extradition from Spain. Although this request was based on indictment 73-CR-164, the order of the Spanish court directing extradition listed the dates of the conspiracy as running from January 1969 to September 1972, the period covered by indictment 72-CR-1162.

Appellant was tried and convicted under indictment 73-CR-164, and this is an appeal from that conviction. Appellant asserts that the discrepancy between the dates contained in the order of extradition and those of indictment 73-CR-164 deprived the District Court of jurisdiction under the "principle of specialty" which restricts prosecution to the crime for which extradition was specifically granted. *United States* v. *Rauscher,* 119 U.S. 407 (1886).

In *United States* v. *Paroutian,* 299 F.2d 486 (2d Cir. 1962), the defendant was extradited from Lebanon on the basis of an indictment issued in the Southern District

of New York charging him with narcotics trafficking in violation of former sections 173 and 174 of Title 21, U.S.C. but was tried on a subsequent indictment issued in the Eastern District which included two counts—receipt and concealment of heroin—not covered by the Southern District's indictment. We upheld the jurisdiction of the District Court in that case on the ground that the Lebanese would not consider "that [defendant] was tried for anything else but the offense for which he was extradited, namely, trafficking in narcotics". *United States* v. *Paroutian, supra,* 299 F.2d at 491. We think the same reasoning is dispositive of appellant's contentions on this appeal.

Appellant's other assertions of error merit no discussion. The judgment of conviction is affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing PETITION FOR REHEARING was mailed to the following:

DAVID G. TRAGER,
United States Attorney,
United States Courthouse,
225 Cadman Plaza East,
Brooklyn, New York 11201.
Attn: Bernard J. Fried,
Chief, Appellate Division

DATED: December 14, 1976.

Joseph Beeler
JOSEPH BEELER